

MARICOPA COUNTY FLOOD CONTROL DISTRICT BOARD OF DIRECTORS MINUTE BOOK

May 19, 2004

The Board of Directors of the Flood Control District of Maricopa County, Arizona, convened at 9:00 a.m., May 19, 2004, in the Board of Supervisors' Auditorium, 205 W. Jefferson, Phoenix, Arizona, with the following members present: Andy Kunasek, Chairman, District 3; Fulton Brock, District 1; Don Stapley, District 2, Max W. Wilson, District 4, and Mary Rose Wilcox, District 5. Also present, Fran McCarroll, Clerk of the Board; Shirley Million, Administrative Coordinator; David Smith, County Administrative Officer and Paul Golab, Deputy County Attorney. Votes of the Members will be recorded as follows: (aye-no-absent-abstain)

LAND SALE EASEMENT DISPUTES TO THE ARIZONA STATE LAND DEPARTMENT

Item: Approve giving notice to the Arizona State Land Department and U.S. Natural Resources Conservation Service to resolve disputed easement matters regarding State Land. (Discussed in executive session on May 3, and 19, 2004.) (Addendum item F-A-2.) (C6904099M) (ADM1900-004)

Julie Lemmon, Contract Counsel representing the Flood Control District (FCD), reported that in 2001 the District had been advised by the Arizona Land Department that easements in Pinal County on which three flood control structures had been built, "will void under the State Enabling Act." Since that time the District and the Board of Directors have engaged in conversations and research on the matter and the culmination is that Ms. Lemmon has advised the District to consider sending letters to the Arizona State Land Department (ASLD) and to the Natural Resources Conservation Service (NRCS) (who actually built the three structures) regarding the easement."

State Land Commissioner Mark Winkleman addressed the Board of Directors on the matter and thanked them for the opportunity and for indulging his schedule by moving this item forward on the agenda. He said he felt there had been a former lack of communication between the Commissioner and the Board on the easements in question, and before any action was taken he wanted the Board to know his thinking, as the current Land Commissioner. He explained that the land in question is in the East Valley, mostly in northern Pinal County and said, "It is probably the most valuable asset that the State Land Department (the State Trust) has at this point. It is 200 square miles of contiguous land directly in the path of growth."

He said that the East Valley had grown out to that land and been stopped, "Not by any lack of demand but because of our inability to plan this and put it into production." He said the Department is working hard to get this resolved, "Because we have the ability to make billions of dollars out there for Arizona schools." He said that the topography of the land "was amazing, with much of it being flat and very suitable for development, and other portions are hillsides with amazing beauty that should be conserved." He explained that the State wants to plan something very special that will enhance the value of the entire area.

He acknowledged that the Flood Control Project is a very important part of that area. The State owns thousands of acres on both sides of the dams, which protect much of the land as they do for much of the City of Mesa. He said the easement had been granted almost 50 years ago at a time when there was little development in that area, and in retrospect it appeared that not enough analysis had been done to determine which lands should be encumbered by the easement. He said that much of the encumbered land has now become very valuable.

In 1968 a Supreme Court decision changed the way the Land Department operates and some of the easements that had been granted were questioned, "and this is one of them." He said there have been many discussions since he took office 18 months ago, and unfortunately they had been "more legal than solution oriented." He reported that he has also talked to the Cities of Mesa and Apache Junction, the East Valley Partnership, Pinal County and many private individuals to seek a solution so that planning

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may begin. The talks have since disintegrated into a verifiable legal dispute for which the biggest challenge has been funding. He indicated that the lawyers could continue to battle over it, or his preference would be to join together to try to find a viable solution.

The Commissioner referenced the legal finding that there could be trespass issues with the Flood Control District over the past 50 years because the easement may not be valid. He acknowledged, "The dams need to be out there, they're very important." He said that 36 months ago, when this matter first became apparent, the Land Department sent a letter to the District stating they wanted them "to continue to operate this facility and we will not consider you in trespass in doing so." As recently as February 2004 he had personally confirmed that position in a letter to "one of your representatives." He added, "Let there be no misunderstanding – since that first letter was sent 2½ years ago we don't believe any trespass damages are accruing." He added, "Whether they accrued prior to that or not – it predates me and it predates most of you. What we do now doesn't really change that – it's either out there or it's not. But at this point we've asked that you continue to take care of these facilities and we won't hold you in trespass for doing so." He said he wanted to make that point as clear as it needs to be.

Mr. Winkleman reported that discussions have also ensued on reducing the 19,000 acres (currently leased to the District) down to a more manageable or more appropriate amount. Any agreement could run the risk of being invalid. Mr. Winkleman believes the ultimate solution is the "reform package" that he categorized as very broad and encompassing many things other than these 19,000 acres or trespass issues. It includes the resolution of this easement and includes other easements that are similarly affected by the changes in the law. He said the package is in front of the Legislature now and will hopefully be taken to the voters this year and then on to Congress for enactment.

He referenced the portions of the Reform Act detailing the easement involving the Flood Control District. This new language would amend the State Constitution. A.R.S. §37.46(e) primarily addresses the FCD easement:

"A replacement right-of-way may be granted for consideration other than monetary consideration if the applicant proves to the Commissioner's satisfaction that the specific benefit described in the preceding subsection will be provided."

The Commissioner said that in his mind the non-monetary consideration would certainly take into account things like building flood control structures, maintaining flood control structures and protecting state trust lands that would now become useable because of those structures. This provides a mechanism to come up with a legitimate solution under the Constitution. He explained that the Reform Act was drawn by a "far flung coalition" that covers various areas and interests. The beneficiary is the schools in the State, and they played a big role in writing it and have strong feelings about it. The proposed legislation is subject to change and the committee is in the process of looking at it very closely to do that right now.

He reported that easements involving roadways are different from the ones involving the Flood Control District but are also similar, in that the easements granted prior to 1968 were without (economic or monetary??? – it seemed to be implied) consideration and now the law says "Perhaps that shouldn't have been the case." There are more than 900 of these roads all over the state, and the vast majority are roadways that have been in existence for decades. The total for all of the easements is 40,000 acres. The easement involving the FCD is 19,000 of those acres with the balance being the small strips of roadway that are located throughout the state. The land involving the roadways is not being questioned by anyone, but that is not the case with the FCD easement where everyone believes that 19,000 acres is far too large, and far too valuable at today's land prices. He said the issue needs an engineering study to maximize the various land uses and values. "We can't force the FCD to spend any money, we can't force

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them to build dams other than exist out there, we couldn't do anything that you wouldn't agree to. And if we can't reach an agreement we've all got our legal remedies, but I don't think – myself – that this situation is getting worse by waiting." He agreed that it is a "tough problem" that takes time and money and he said he hoped the right tools are developed to allow an engineered result to this problem, "so that you can go on taking care of these and we can go on about selling the land that won't be affected by the easement area. I think that solution is better for the State Land Department, it's better for the State Legislature and I think it's better for Maricopa County Flood Control District." He pledged his willingness to work together to accomplish this.

Director Stapley said, "Before us is a proposal to deliver a letter to yourself and your department, and we've got a draft of that letter we can give you before you leave. It also goes to the U.S. Natural Resources Conservation Service, who is the third party in this agreement. If we move forward with this but don't make it effective for a period of two weeks when we meet again in a formal meeting, would that give us time to sit down with you to see if we can't craft some kind of Intergovernmental Agreement that would address some of the concerns you have, as well as the concerns the County has, so the greater good of the public is served." He spoke of setting aside all the politics and the legal aspect of it and stressed that the County doesn't want to do anything that's going to hurt "anybody." He indicated he was speaking of the property owners and the home owners who live in the path of what could be a flood if this structure were to be breached."

Mr. Winkleman said he didn't know what the letter said but assumed it contained language that would force some action during the next two weeks. He indicated that he preferred to cooperate and come to an agreement, "as opposed to battling with each other because this is an important issue, and we'll devote as much time as we need to."

Director Stapley said it was important for the public to understand that the construction of the earthen dams was not paid for by Maricopa County Flood Control District ratepayers but was federally funded by Congress. He stated, "In the future, I don't envision the FCD of Maricopa County funding a reconstruction of those structures that are over in Pinal County, especially given all the changes in topography and development that's taken place in that area over the past 50 years." He explained that the original intent of the earthen dams was to protect farm lands – and now we've got acres of homes instead of farms." He added, "There's still a need for protection but the real question is who should be responsible for the development of the next generation of dams and/or water and flood control structures." He said he didn't know everything that the County had committed to when they agreed to maintain those structures, which the federal government funded, and the Conservation Service owns, "but that's another discussion we need to get into with this."

Chairman Kunasek asked counsel if a two-week delay would harm this action in any way. He also asked if there would be the ability to rescind this action at the next Board meeting if desirable changes occurred during the talks.

Ms. Lemmon reported that a two-week delay would work as long as a date certain was given that the letter would become effective and the draft letter is modified accordingly.

Chairman Kunasek said he hoped this delay would work to everyone's benefit but asked Mr. Winkleman to remember that the former Land Commissioner and Attorney General's letter "took a very hard line that has not been moved, and that former Attorney General is now Governor Napolitano." He added that he was happy with Mr. Winkleman's commitment and he hoped "that commitment was also the commitment of the Governor and the State of Arizona." He alluded to the first letter, "Which left the County with no wiggle room and simply in a state of trespass, and that the leases were null and void." He said he felt that

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resolving this would take a softening and a reconsideration of her former position, "and hopefully she's done that."

Supervisor Wilcox said she could support this suggestion with the hope that actions during the two-week period would provide the impetus for rescission of the letter. She asked if the date given should be the day following the next Board meeting so it could be rescinded at the meeting. Ms. Lemmon agreed that this would be appropriate.

Mr. Winkleman said he would be out of town for one week and his deputy would attend for him and be in contact with him.

Motion was made by Supervisor Stapley, seconded by Supervisor Wilcox, and unanimously carried (5-0) to approve addendum item F-A-2 further directing the District's representative and counsel to meet with representatives from the State Land Commission to further this discussion and look at all the aspects of the draft letter (which would be provided to the Commissioner today) to seek solutions and/or an IGA that is appropriate for this situation. The letter will have an effective date of Thursday, June 3, 2004.

MINUTES

Motion was made by Director Wilcox, seconded by Director Stapley, and unanimously carried (5-0) to approve the minutes from meetings held on April 7 and 21, 2004.

PERSONNEL AGENDA

Motion was made by Director Wilcox, seconded by Director Stapley, and unanimously carried (5-0) to approve Flood Control District Personnel Agenda (Exhibit C). Exhibit C will be found at the end of this set of minutes.

EASEMENTS AND RIGHT-OF-WAY DOCUMENTS

No documents were presented at this time. (ADM1910)

INTERGOVERNMENTAL AGREEMENT WITH CITY OF PEORIA

Motion was made by Director Wilcox, seconded by Director Stapley, and unanimously carried (5-0) to approve Intergovernmental Agreement (IGA) FCD 2003A008 between the Flood Control District of Maricopa County (District) and the City of Peoria (Peoria) for the 83rd Avenue and Pinnacle Peak Road Drainage Improvements (Project 450 - Glendale/Peoria ADMP). The district will lead the design, R/W acquisition, and utility relocation for the project. The district and Peoria shall share equally (50/50) in the project design, R/W acquisition, and utility relocation costs, estimated to be \$2,000,000 (approximately \$1,000,000 each). A future IGA will define the responsibilities for the construction, construction management, and the operations and management of the project. This agreement shall expire five years from the date of recording with the County Recorder or upon completion of the project and after all funding obligations and reimbursements have been satisfied in accordance with this agreement, whichever is the first to occur. By mutual written agreement of both parties, this agreement may be amended or terminated. (C69040642)

INTERGOVERNMENTAL AGREEMENT WITH CITY OF GLENDALE

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Motion was made by Director Wilcox, seconded by Director Stapley, and unanimously carried (5-0) to approve Intergovernmental Agreement (IGA) FCD 2003A015 between the Flood Control District of Maricopa County (District) and the City of Glendale (City) for an Easement for Recreational Use of District Property. The purpose of this IGA is to identify and define the roles, responsibilities, liabilities, and rights of the district and the city regarding the pathway's use and maintenance of district property. The terms of this agreement and any subsequent easement shall be for twenty-five years from the effective date and shall be renewable for successive twenty-five year terms unless otherwise terminated by the parties. Notwithstanding any other terms of this agreement, the district may amend or cancel any easement issued under this agreement for reasonable cause deemed to be in the best interest of the district. (C69040682)

CONTRACT WITH KIRKHAM MICHAEL & ASSOCIATES, INC.

Motion was made by Director Wilcox, seconded by Director Stapley, and unanimously carried (5-0) to award Contract FCD 2004C005, On-Call Post Design Services, to Kirkham Michael & Associates, Inc. The contract will be effective for 730 calendar days from the date of execution or until the contract expenditure of \$50,000, whichever occurs first. The Flood Control District of Maricopa County (District) and Kirkham Michael & Associates, Inc., will mutually agree to a detailed scope of work for each work assignment prior to the commencement of any work. A not-to-exceed fee will be negotiated for each work assignment prior to the notice-to-proceed with each assignment. This negotiated fee will be in accordance with the rates included as Exhibit B to the contract. (C69040885)

CONTRACT WITH JE FULLER/HYDROLOGY & GEOMORPHOLOGY, INC.

Motion was made by Director Wilcox, seconded by Director Stapley, and unanimously carried (5-0) to award Contract FCD 2004C001, Lower Hassayampa River Watercourse Master Plan to JE Fuller/Hydrology & Geomorphology, Inc. The basic contract is for a lump sum of \$886,419.58, plus a not-to-exceed fee of \$93,975.83 for optional items. The optional items, which include public involvement, stakeholder meetings, two-dimensional modeling, hydraulic and floodplain surveys, will only be implemented if needed. The total contract amount, including the optional items, will not exceed \$980,395.42. The contract performance is for 400-calendar days effective the date of the notice-to-proceed. (C69040925)

SETTLEMENT ON ROCKLAND MATERIALS

Motion was made by Director Wilcox, seconded by Director Stapley, and unanimously carried (5-0) to approve the acceptance of the settlement CV2001-006897, Flood Control District of Maricopa County v. GTI Capital Holdings, LLC, dba Rockland Materials. (Discussed in executive session on May 17, 2004.) (Addendum item F-A-1.) (C6904098M) (ADM1900-004)

MEETING ADJOURNED

There being no further business to come before the Board, the meeting was adjourned.

Andy Kunasek, Chairman of the Board

ATTEST:

Fran McCarroll, Clerk of the Board